Abdul Razak Sheikh Mahmood & Anor v Bhupinder Singh s/o Avtar Singh & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22NCC-725 OF 2011
NALLINI PATHMANATHAN J
13 DECEMBER 2011

Civil Procedure — Limitation — Defendants raising defence of time bar against plaintiffs' claim — Trust — Trust property — Claim for specific performance of contract involving recovery of trust property by beneficiary from trustee — Whether action founded on contract or trust — Whether action time-barred — Limitation Act 1953 ss 6(6)& 22

Contract — Assignment — Form of assignment — Whether word 'assignment' must be used — Whether particular form of words must be used for assignment — Whether sufficient to merely show intention to assign

Equity — Defences — Laches — Delay of 13 years in recovery of trust properties — Whether principle of laches applicable — Whether defendant detrimentally affected

Land Law — Sale of land — Bare trust — Sale of assets upon dissolution of business — Plaintiffs' undertaking to divest ownership of shares in return for defendants promising to divest ownership of shop house — Plaintiffs performing its obligations in full — Plaintiffs demanding for transfer of shop house — Whether bare trustee concept applied — Whether legal title to shop house held on trust for plaintiffs

Limitation — Trusts — Trust property — Claim for specific performance of contract involving recovery of trust property by beneficiary from trustee — Whether action founded on contract or trust — Whether action time-barred — Limitation Act 1953 ss 6(6) & 22

Trusts and Trustees — Trust property — Distribution and sale — Bare trust — Sale of assets upon dissolution of business — Plaintiffs' undertaking to divest ownership of shares in return for defendant promising to divest ownership of shop house — Plaintiffs performing its obligations in full — Plaintiffs demanding for transfer of shop house — Whether bare trustee concept applied — Whether clear intention to divest ownership of property

The plaintiffs found their claims against the defendants on the basis of two sale and purchase agreements dated 26 November 1997. The plaintiffs and the first to sixth defendants ('D1–D6') in 1997 were business associates in various companies and businesses including the seventh defendant ('D7'), the eighth defendant ('D8') and one Fabrika Technologies Sdn Bhd ('FTSB'). The plaintiffs owned 51% of the paid up share capital of D7 while D1–D6 owned the remaining 49%. As for D8, the plaintiffs owned 34% of the paid up share capital while the remaining 66% was held by nominees of D1–D6. The plaintiffs also held 55% of the shares in FTSB while D1–D6 owned the remaining 45% shareholding. D8 was the registered owner of a terrace shop house in Gombak ('the shop house'). Around September 1997 the plaintiffs and the six defendants decided to dissolve their business association and distribute the assets. The first plaintiff was desirous of acquiring all the interests of the other parties (collectively called the second party) in D7. In consideration of the same, the second party collectively was desirous of acquiring all the interests of the plaintiff in D8 and FTSB. Hence, on 26 November 1997 a share sale agreement ('the first agreement') was executed between the plaintiffs on one hand and D1 to D6 on the other hand wherein: (i) the plaintiffs agreed to transfer their 51% shareholding in D7 to D1–D6; and (ii) in consideration thereof, D1 to D6 agreed to transfer their 45% shareholding in FTSB to the plaintiffs. Additionally D1 to D6 agreed to pay the plaintiffs the sum of RM 180,000 by way of an initial deposit of RM50,000 and the balance RM130,000 to be paid in six instalments. On the same day, a second agreement was entered into between the plaintiffs and D7 and D8 ('the second agreement') wherein: (i) the plaintiffs agreed to transfer their 34% shareholding in D8 to D7; (ii) in consideration thereof, D7 as the beneficial owner and D8 as the registered owner of the shop house agreed to transfer the shop house to the plaintiffs; (iii) D7 and D8 agreed to deliver all relevant documents to effect the registration of the title of the shop house to the plaintiffs within five working days. The plaintiffs performed their part of the bargain under the first agreement. However D1 to D6 did not transfer their 45% shareholding in FTSB to the plaintiffs. Neither did they pay the full sum of RM180,000 under the first agreement. As for the second agreement, the plaintiffs had performed their part of the bargain by transferring their 34% shareholding in D8 to D7 as undertaken. However, the shop house was never transferred to the plaintiffs. After a lapse of some eight years, the plaintiffs demanded for the registration of the transfer of the FTSB shares in their names and for the registration of the transfer of the shop house. The defendants claimed that the plaintiffs' claims were time barred under the Limitation Act 1953 ('Act'). The plaintiff contended that by virtue of s 22 of the Act, the current action was an action by a beneficiary under a trust to recover from the trustee, trust property.

Held:

(1) The plaintiffs had pleaded a cause of action founded both in contract as

well as premised on the recovery of trust property in the possession of a trustee, namely the defendants. The existence of a trust and the fact that property comprising the subject matter of the first and second agreements was held by the defendants on trust for the plaintiffs was specifically pleaded (see paras 24–25).

(2) Causes of action for specific performance of a contract which involve or encompass the recovery of trust property by a beneficiary from a trustee is not caught by the limitation period of six years prescribed under s 6(6) of the Act, but is subject to s 22 of the Act which requires that either subsection (a) or (b) be proved whereupon no limitation period applies (see para 28).

(3) The plaintiffs undertook to divest themselves of the ownership of their shares in D8, in return for which D7 promised to divest itself of its beneficial ownership of the shop house. As the plaintiff has performed its obligations in full by effecting the full consideration undertaken in the second agreement, and as D7 too had, through its solicitors, made available to the plaintiffs' solicitors the requisite memorandum of transfer as well as transfer document of title, it followed that D7 full intended to and took the requisite steps to divest itself of ownership of the shop house to the plaintiffs. Thus, the applicability of the bare trustee concept to the sale of property was clear. As D8 was the trustee holding trust property, the beneficiary, namely the plaintiffs enjoyed the right under s 22(1)(b) of the Act to recover such trust property from the possession of the trustee. No limitation period was applicable in these circumstances (see paras 45 & 52).

(4) Alternatively, the second agreement effectively amounted to an assignment of D7's beneficial interest in the shop house in favour of the plaintiffs. The fact that the words assignment did not appear in the second agreement was immaterial. No particular form of words is required so long as the words clearly show an intention that the assignee, ie the plaintiffs were to have the benefit of the chose or thing in action, namely the beneficial interest in the shop house. That indeed was the case here. As such, D8 held the legal title to the shop house on express trust for the plaintiffs. On this reasoning too, the plaintiffs' claim was not barred by limitation (see para 54).

(5) In relation to the FTSB shares, the plaintiffs had fulfilled fully the obligations required of them under the first agreement namely the transfer of their shareholding in D7 to D3–D6. Therefore the consideration due from them was fully satisfied. The duly executed share transfer forms for the FTSB shares in favour of the plaintiffs were also issued by D3–D6 to the plaintiffs. This signified a clear intention to divest themselves of ownership of the FTSB shares. The plaintiffs by initiating this action were in effect seeking specific performance of that

part of the contract relating to the transfer of the shares. A claim for specific performance is subject to s 22 of the Act. Further, the plaintiffs had proved the existence of a trust in their favour since December 1997 warranting the applicability of s 22(1)(b) of the Act which defeated the defence contention that the claim was time-barred. The plaintiffs were therefore entitled to recovery of the FTSB shares (see paras 57–58 & 65).

(6) While there was a considerable delay amounting to about 13 years, the crucial factor was to determine whether such delay had resulted in any acts which detrimentally affect particularly the defendant. This did not appear to be a case where laches would apply so as to defeat the plaintiffs' claim (see para 72).

[Bahasa Malaysia summary

Plaintif-plaintif mengasaskan tuntutan mereka terhadap defendan-defendan berdasarkan dua perjanjian jual beli bertarikh 26 November 1997. Plaintif-plaintif dan defendan-defendan pertama hingga keenam ('D1–D6') pada tahun 1997 merupakan rakan perniagaan dalam pelbagai syarikat dan perniagaan termasuklah defendan ketujuh ('D7'), defendan kelapan ('D8') dan Fabrika Technologies Sdn Bh ('FTSB'). Plaintif-plaintif memiliki 51% modal saham berbayar D7 manakala D1–D6 memiliki baki 49% tersebut. Bagi D8, plaintif-plaintif memiliki 34% daripada modal saham berbayar manakala baki 66% dipegang oleh calon D1–D6. Plaintif-plaintif juga memegang 55% saham dalam FTSB manakala D1–D6 memiliki baki 45% pegangan saham. D8 adalah pemilik berdaftar rumah kedai teres di Gombak ('rumah kedai'). Sekitar bulan September 1997 plaintif-plaintif dan enam defendan memutuskan untuk membubarkan persatuan perniagaan mereka dan mengagihkan aset. Plaintif pertama berhasrat memperoleh semua kepentungan pihak-pihak lain (secara kolektif dipanggil pihak kedua) dalam D7. Sebagai balasan yang sama, pihak kedua secara kolekti berhasrat memperoleh semua kepentingan plaintif dalam D8 dan FTSB. Justeru itu, pada 26 November 1997 satu perjanjian jualan saham ('perjanjian pertama') telah dimasuki antara plaintif-plaintif di satu pihak dan D1 hingga D6 di pihak lain di mana: (i) plaintif-plaintif bersetuju memindah hak 51% pegangan saham dalam D1–D6; dan (ii) sebagai balasan tersebut, D1–D6 bersetuju untuk memindah hak 45% pegangan saham mereka dalam FTSB kepada plaintif-plaintif. Selain daripada itu D1 hingga D6 bersetuju membayar plaintif-plaintif jumlah RM180,000 melalui deposit pendahuluan RM50,000 dan baki RM130,000 yang perlu dibayar dalam enam ansuran. Pada hari sama, perjanjian kedua telah dimasuki antara plaintif-plaintif dan D7 dan D8 ('perjanjian kedua') di mana: (i) plaintif-plaintif bersetuju untuk memindah hak 34% pegangan saham mereka dalam D8 kepada D7; (ii) sabagai balasan tersebut, D7 sebagai pemilik benefisiari dan D8 sebagai pemilik berdaftar rumah kedai bersetuju memindah hak rumah kedai kepada pliantif-plaintif; (iii) D7 dan D8 bersetuju menghantar semua dokumen relevan untuk

melaksanakan pendaftaran hak milik rumah kedai itu kepada plaintif-plaintif dalam tempoh lima hari bekerja. Plaintif-plaintif telah melaksanakan bahagian mereka di bawah perjanjian pertama. Walau bagaimanapun D1 hingga D6 tidak memindah hak 45% pegangan saham mereka dalam FTSB kepada plaintif-plaintif. Mereka juga tidak membayar jumlah penuh RM180,000 di bawah perjanjian pertama. Berhubung perjanjian kedua, plaintif-plaintif telah melaksanakan bahagian mereka dengan memindah hak 34% pegangan saham mereka dalam D8 kepada D7 sebagaimana dijanjikan. Walau bagaimanapun, rumah kedai itu tidak dipindah milik kepada plaintif-plaintif. Selepas lebih lapan tahun, plaintif-plaintif menuntut pendaftaran pindah milik saham-saham FTSB dalam nama mereka dan untuk pendaftaran pindah milik rumah kedai itu. Defendan-defendan mendakwa bahawa tuntutan-tuntutan plaintif-plaintif telah luput masa di bawah Akta Had Masa 1953 ('Akta') Plaintif menegaskan bahawa menurut s 22 Akta, tindakan ini adalah tindakan oleh benefisiari di bawah amanah untuk mendapat balik daripada pemegang amanah, harta atas amanah.

Diputuskan:

(1) Plaintif-plaintif telah memplid kausa tindakan yang berasaskan kontrak dan mendapat balik harta atas amanah dalam milikan seorang pemegang amanah, iaitu defendan-defendan. Kewujudan amanah dan fakta bahawa harta itu merangkumi perkara pokok perjanjian pertama dan kedua dipegang oleh defendan-defendan atas amanah untuk plaintif-plaintif secara spesifik telah diplidkan (lihat perenggan 24–25).

(2) Kausa-kausa tindakan untuk pelaksanaan spesifik kontrak yang melibatkan atau meliputi mendapat balik harta atas amanah oleh benefisiari daripada pemegang amanah tidak terikat oleh tempoh had masa enam tahun itu sebagaimana ditetapkan di bawah s 6(6) Akta, tetapi tertakluk kepada s 22 Akta yang menghendaki sama ada subseksyen (a) atau (b) dibuktikan jika tiada tempoh had masa terpakai (lihat perenggan 28).

(3) Plaintif-plaintif telah mengakujanji untuk melucutkan diri mereka dalam pemilikan saham-saham mereka dalam D8, sebagai balasan di mana D7 berjanji akan melucutkan dirinya daripada pemilikan benefisiari rumah kedai itu. Oleh kerana plaintif telah melaksanakan tanggungjawabnya sepenuhnya dengan melaksanakan sepenuhnya balasan yang dijanjikan dalam perjanjian kedua, dan seperti mana D7 juga telah, melalui peguamnya, menyediakan kepada peguam plaintif-plaintif memorandum pindah milik yang diperlukan dan juga surat ikatan hak milik pindah milik, adalah diikuti bahawa D7 yang berhasrat sepenuhnya untuk dan mengambil langkah-langkah yang diperlukan untuk melucutkan diri sendiri daripada pemilikan rumah kedai kepada plaintif-plaintif. Oleh itu, pemakaian konsep pemegang

amanah biasa terhadap jualan harta adalah jelas. Oleh kerana D8 adalah pemegang amanah yang memegang harta atas amanah, benefisiari itu, iaitu plaintif-plaintif menikmati hak di bawah s 22(1)(b) Akta untuk mendapat balik harta atas amanah daripada milikan pemegang amanah. Tiada tempoh had masa terpakai dalam keadaan berikut (lihat perenggan 45 & 52).

(4) Secara alternatif, perjanjian kedua dengan berkesan membentuk penyerahakan kepentingan benefisiari D7 dalam rumah kedai yang menyebelahi plaintif-plaintif. Fakta yang mana perkataan-perkataan penyerahakan tidak terdapat dalam perjanjian kedua adalah tidak penting. Tiada bentuk perkataan-perkataan tertentu diperlukan selagi perkataan-perkataan itu jelas menunjukkan niat bahawa penyerahhak, iaitu plaintif-plaintif akan mempunyai manfaat pilihan atau perkara dalam tindakan, iaitu kepentingan benefisiari dalam rumah kedai. Itulah sememangnya dalam kes ini. Oleh itu, D8 memegang hak milik sah ke atas rumah kedai atas amanah nyata untuk plaintif-plaintif. Atas sebab itu juga, tuntutan plaintif-plaintif tidak terbatas oleh had masa (lihat perenggan 54).

(5) Berkaitan saham-saham FTSB, plaintif-plaintif telah memenuhi sepenuhnya tanggungjawab yang diperlukan oleh mereka di bawah perjanjian pertama iaitu pindah milik pegangan saham dalam D7 kepada D3–D6. Oleh itu balasan yang wajar daripada mereka telah dipenuhi sepenuhnya. Borang-borang pindah milik saham telah pun dilaksanakan bagi saham-saham FTSB bagi pihak plaintif-plaintif juga telah dikeluarkan oleh D3–D6 kepada plaintif-plaintif. Ini menandakan niat jelas untuk melucukan diri mereka daripada pemilikan saham-saham FTSB. Plaintif-plaintif dengan memulakan tindakan ini melakukan pelaksanaan spesifik berdasarkan bahagian kontrak berkaitan pindah milik saham-saham. Tuntutan untuk pelaksanaan spesifik tertakluk kepada s 22 Akta. Selanjutnya, plaintif-plaintif telah membuktikan kewujudan suatu amanah di pihak mereka sejak Disember 1997 yang mewajarkan pemakaian s 22(1)(b) Akta yang menggagalkan hujah pembelaan bahawa tuntutan tersebut telah luput had masa. Plaintif-plaintif dengan itu berhak mendapat balik saham-saham FTSB (lihat perenggan 57–58 & 65).

(6) Walaupun terdapat kelewatan agak lama sehingga 13 tahun, faktor penting adalah untuk menentukan kelewatan tersebut telah mengakibatkan apa-apa perbuatan yang menjejaskan terutamanya kepada defendan. Ini tidak kelihatan dalam kes di mana 'laches' akan terpakai bagi menggagalkan tuntutan plaintif-plaintif (lihat perenggan 72).]

Notes

For a case on defendant raising defence of time bar against plaintiff's claim, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5150.

For a case on distribution and sale, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2892.

For a case on trust property, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2464.

For cases on assignment in general, see 3(2) *Mallal's Digest* (4t Ed, 2011 Reissue) paras 2846–2903

For cases on bare trust, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4508–4510.

For cases on laches, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2679–2682.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (folld)

Chin Choy & Ors v Collector of Stamp Duties [1981] 2 MLJ 47, PC (refd)

Howlett v Howlett [1949] Ch 767 (refd)

Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116, FC (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)

Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149, FC (refd)

Pennington v Waine [2002] 4 All ER 215, CA (refd)

Len Chee Omnibus Co Ltd Chin Sow Lan, In re v Lee Chee Omnibus Co Ltd & Ors [1969] 2 MLJ 202 (refd)

Lindsay Petroleum Co V Hurd (1874) LR 5 PC 221 (folld)

Smith v Clay (1767) 3 Bro CC 639n (refd)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (folld)

Legislation referred to

Civil Law Act 1956 s 6

Companies Act 1965 s 132

Companies Regulations 1966 Form 49

Evidence Act 1950 s 106

Limitation Act 1953 ss 6, 6(6), 22, 22(1)(a), (1)(b)

Limitation Act 1980 [UK] s 21(1)(b)

National Land Code Form 14A

Real Property Gains Tax Act 1976

Michael Chow (Sunita Sankey with him) (Sankey & Co) for the plaintiff.

Ananthan Krishnan for the third and sixth defendants.

Alex de Silva (S Shamalah with him) (Bodipalar Ponnudurai De Silva) for the seventh and eighth defendants.

Nallini Pathmanathan J:

[1] The plaintiffs, who are husband and wife respectively, found their claims against the defendants on the basis of two sale and purchase agreements dated 26 November 1997.

[2] The plaintiffs and the first to sixth defendants, ('D1–D6') in 1997 were business associates in various companies and businesses including the seventh defendant, Fabrika Am Holdings Sdn Bhd ('D7'), the eighth defendant, Fabrika Topi Am Holdings Sdn Bhd ('D8') and one Fabrika Technologies Sdn Bhd (which is not a party to this suit). In 1997 the plaintiffs owned approximately 51% of the paid up share capital of D7 while D1–D6 owned the remaining 49%. As for D8, the plaintiffs owned approximately 34% of the paid up share capital while the remaining 66% was held by third parties who are acknowledged nominees of D1–D6. The plaintiffs also held in 1997, 55% of the shares in Fabrika Techonologies Sdn Bhd while D1–D6 owned the remaining 45% shareholding.

[3] It is relevant that D8 was and remains the registered owner of land HS (D) 4267, PT 9048 Mukim Setepak, Daerah Gombak, Selangor with a terrace shop house bearing the postal address No 48, Jalan Bandar 1, Taman Melawati 53100 Kuala Lumpur. It has since been issued with a new title namely Grant 39484, Lot 14443 Mukim Setapak, Daerah Gombak, Selangor. This property shall be referred to as 'the shop house'.

SALIENT FACTS

[4] The salient facts giving rise to the dispute here are as follows:

(a) in or around September 1997 the plaintiffs and the six defendants decided to dissolve their business association and distribute the assets. This is recorded in a memorandum of understanding signed between the first plaintiff, D2, D3 and one Avtar Singh, the father of the first defendant. The memorandum of understanding dated 10 September 1997 records that the first plaintiff was desirous of acquiring all the interests of the other parties, known collectively as the second party, in Fabrika Am Holdings Sdn Bhd ie D7. The assets of D7 included the shophouse. In consideration of the same, the second party collectively was desirous of acquiring all the interests of the plaintiff in D8, Fabrika Berets (M) Sdn Bhd and Fabrika Technologies Sdn Bhd. The parties then agreed to undertake all necessary acts, steps and actions necessary to

transfer their respective interests in the respective companies. This is how the two share sale agreements which are the subject matter of dispute came about;

(b) On 26 November 1997 a share sale agreement ('the first agreement') was executed between the plaintiffs on one hand and D1–D6 on the other hand. The material terms of the first agreement include the following:

(i) the plaintiffs agreed to transfer their 51% shareholding in D7 to D1–D6 who already owned 49% of D7. This is reflected in cl 5.1; and

(ii) in consideration of the aforesaid transfer, D1–D6 agreed to transfer their 45% shareholding in Fabrika Technologies Sdn Bhd to the plaintiffs, who already owned 55%. This is reflected in cl 6.1. Additionally D1–D6 agreed to pay the plaintiffs the sum of RM180,000; This sum was to be paid by way of an initial deposit of RM50,0000 with the balance RM130,000 in six instalments as set out in Schedule 4 of the first agreement, the last of which was due on 26 May 1998. This is reflected in cll 6.1, 6.2 and 3.6. D1–D6 agreed to undertake joint and several responsibility for the repayment of the balance RM130,000 to the plaintiffs under cl 6.3.

(c) on the same day, ie 26 November 1997, a second written agreement was entered into between the plaintiffs on the one hand, and D7 and D8 on the other hand ('the second agreement'). Under the terms of this second agreement:

(i) the plaintiffs agreed to transfer their 34% shareholding in D8– D7. (Under the first agreement D7 was to be wholly owned by D1–D6);

(ii) in consideration of such transfer, D7 as the beneficial owner and D8 as the registered owner of the shop house agreed to transfer the shop house to the plaintiffs free from encumbrances with vacant possession. This is reflected in cll 6.1, 8.1.1 and 8.1.6 as well as the recitals; and

(iii) D7 and D8 agreed to deliver all relevant documents to effect the registration of the title of the shop house to the plaintiffs within five working days of the second agreement or within a reasonable time. Similarly they undertook to give vacant possession of the same to the plaintiffs.

(d) the net effect of the first and second agreements was that:

(i) the plaintiffs would acquire the entire shareholding of Fabrika

Technologies Sdn Bhd, and a sum of RM180,000 from D1–D6 and the shop house from D7 and D8; and

(ii) D1–D6 would acquire the entire shareholding and thus ownership of D7 and D8 (the latter through their nominees).

[5] It is not in dispute that the plaintiffs performed their part of the bargain under the first agreement by transferring their 51% shareholding in D7 to D1–D6. However D1–D6 have not transferred their 45% shareholding in Fabrika Technologies Sdn Bhd to the plaintiffs. Neither have they paid the full sum of RM180,000 under the first agreement. To date D1–D6 have paid a sum of RM93,600 only. The plaintiffs accept that the claim for the balance sum of RM86,400 is caught by limitation and is time barred.

[6] As for the second agreement, the plaintiffs have performed their part of the bargain by transferring their 34% shareholding in D8–D7 as undertaken. However it is not in dispute that the shop house was never transferred to the plaintiffs and remains registered in the name of D8 while being beneficially owned by D7.

[7] The correspondence between the solicitors of the parties discloses that on 2 December 1997, soon after the execution of the first and second agreements, solicitors for D1–D6 and D7 and D8, Messrs Vasdev Bakshani and Associates wrote to the plaintiffs' solicitors, Messrs Presgrave & Mathews enclosing what is described to be:

(a) a duly executed memorandum of transfer and stamp duty proforma relating to the shop house; as well as

(b) six post-dated cheques for RM130,000;

(c) duly executed share transfer forms relating to the transfer of D1– D6's shares in Fabrika Technologies Sdn Bhd to the plaintiffs; and

(d) in return they enclosed share transfer forms for the transfer of the shareholding in D7 and D8 from the plaintiffs to D1–D6, requesting that the plaintiffs execute the same urgently. The letter stipulates that the documents relating to the transfer of shareholding by the plaintiffs to D1–D6 be effected by the following day, ie 3 December 1997.

[8] On 4 December 1997 the plaintiffs' solicitors wrote to D1–D8's solicitors enclosing:

(a) share transfer forms to effect the transfer of shares in Fabrika Technologies Sdn Bhd to the plaintiffs by way of registration of the same;

(b) the relevant duly executed share transfer forms in favour of D1– D6; as well as

(c) the relevant letters of resignation and resolutions required to reflect the change in shareholdings in all the corporate entities;

(d) they asked that the defendants' solicitors make available, inter alia, the declaration and resolution of the legal owner, D8 to declare and resolve the trust arrangement with respect to the shop house; and

(e) they furnished further documents to facilitate transfer of the plaintiffs' shareholding to D7 on 5 December and repeated their request for documents to reflect the trust arrangement between the parties in relation to the shop house.

[9] Then on 23 February 1998 the defendants' solicitors wrote to advise that they required an extension of time for the settlement of the balance sum of RM86,400 remaining due and owing under the first agreement. The letter was written on a without prejudice basis but there is no dispute on the utilisation of the letter in these proceedings, as this fact is not in dispute. The plaintiffs' refused to accord further time, maintaining that they had already committed the anticipated funds. Thereafter there was a flurry of correspondence between the parties' solicitors on this issue of an extension of time for the payment of this balance sum under the first agreement. The defendants' solicitors essentially sought an enlargement of time while the plaintiffs' solicitors refused any extension. This correspondence extended until 3 July 1998 when the defendants' solicitors made a further request for time, enclosing a sum of RM5,000 towards payment.

[10] Thereafter there was no further correspondence between the respective parties' solicitors or the parties themselves until 12 September 2006. In other words there was a complete lacuna or hiatus in communication or any attempt to complete performance until 12 September 2006, a lapse of some eight years. On 12 September 2006, the plaintiffs' new solicitors, Messrs Wong Beh & Toh wrote two letters to the defendants' solicitors asking for:

(a) a registration of the transfer of the shares in Fabrika Technologies Sdn Bhd to the plaintiffs together with delivery up of all relevant statutory records etc;

(b) further documents to facilitate their registration of the transfer of the shop house. In this context, the plaintiffs' solicitors confirmed that while the transfer in Form 14A of the National Land Code had been executed by the defendants and forwarded to the plaintiffs together with the issue document of title to the shop house, they had not been able to effect registration of the transfer as the following documents had not been made available to the purchasers' solicitors, ie the plaintiff's solicitors: certified true copies of the board resolution of D8 authorising the affixing of the common seal on the transfer;

(i) certified true copy of the general meeting approval of D8

A authorising the disposal of the property to a person connected to the director pursuant to s 132 of the Companies Act;

(ii) certified true copies of the then Form 49 of the Companies Regulations 1966 together with; and

B (iii) the then memorandum and articles of association of D8 together with quite rent and assessment receipts for the shop house

[11] They therefore sought these documents of the defendants.

C **[12]** The defendants' solicitors replied vide letter dated 30 October 2006 stating simply that they had forwarded the issue document of title and the memorandum of transfer and had therefore done all that was required on their part. The plaintiffs' solicitors asked once again for the documents stipulated above and maintained that even if these documents had been forwarded to the D plaintiffs' previous solicitors there was nothing to stop the defendants from furnishing these documents afresh to facilitate the transfer of the property. There was no further response from the defendants resulting in the initiation of this suit on 12 November 2010.

E **[13]** In this suit the plaintiffs seek the enforcement of the first and second agreements, although they appear to concede that that part of the purchase price that remains unpaid ie RM86,400 is time barred.

F **[14]** The defendants, in response to the plaintiffs' claim, maintain that their claims are time barred. D7 and D8 maintain, in essence, that the plaintiffs' claims premised on the second agreement (relating to the transfer of the shop house in exchange for the transfer of shares in D8), is caught by the Limitation Act 1953. More particularly D7 and D8 point to cl 11 read together with cl 3.7 G of the sale and purchase agreement whereby it was agreed that the completion date of the sale and purchase agreement was one month from the date of the second agreement, ie on or by 26 December 1997. If indeed these defendants have breached the second agreement, these defendants maintain that the plaintiff ought to have commenced this suit within six years of 26 December H 1997 ie on or by 26 December 2003, after which the plaintiffs claim was time barred. In essence therefore D7 and D8 maintain that the plaintiffs' claim is premised on breach of contract and is time barred.

[15] The plaintiff meets or rebuts this defence by maintaining that at all I material times, in view of the plaintiffs fulfilment of the terms of the second agreement, D8 held the shop house as a bare trustee as of December 1997. Accordingly it is contended that by virtue of s 22 of the Limitation Act 1953, the current action amounts to an action by a beneficiary under a trust to recover from the trustee, trust property.

[16] As for the first agreement, whereby D1 and D6 agreed to transfer the balance 45% shareholding in Fabrika Technologies Sdn Bhd to the plaintiffs, these defendants also maintain that the plaintiffs' cause of action is time barred as it is premised on a breach of contract where the time bar set in, in or around December 2003. However in like vein the plaintiff rebuts this contention by maintaining that as performance of its part of the bargain was completed on or by 5 December 1997, D1–D6 then held the shares in Fabrika Technologies Sdn Bhd on trust for the plaintiffs. This is further borne out, they maintain, by the correspondence between the parties, which discloses that the defendants at all times were prepared to effect the transfer of the subject shares. As for the balance sum of RM86,400 due under the first agreement, the plaintiffs concede that it is time barred.

[17] It is pertinent that the audited accounts of D7 disclose the existence of a note to the accounts where it is documented that D7 has entered into a sale and purchase agreement relating to the shop house. In these notes to the accounts, a purchase price is indicated. The note goes on to state that the sale and purchase agreement has not been perfected and that the solicitor acting on the agreement is of the opinion that the beneficial interest in the property had already been vested in the purchaser, and that pending registration D7 was a mere trustee of the shop house. It ends by stating that '… the directors are in the process of rectifying the situation'. However no mention is made of precisely how the directors propose to do so. This entry appears consecutively for the years following on from 1999.

[18] These then are the salient background facts which give rise to the issues below.

ISSUES

(a) Is the plaintiffs' claim for:

  (i) the shop house under the second agreement; and

  (ii) the shares in Fabrika Technologies Sdn Bhd under the first agreement

time barred under s 6 of the Limitation Act 1953, or does it fall within the purview of s 22(1)(b) of the Limitation Act 1953 whereby no period of limitation applies?

(b) Does a trust arise in the context of the factual matrix relating to the partial performance of the first and second agreements warranting the application of s 22(1)(b) of the Limitation Act 1953? Does a trust arise in favour of the plaintiffs in respect of the shop house?

(c) Does a bare trust arise in relation to the transfer of Fabrika Technologies Sdn Bhd shares under the first agreement? With respect to the plaintiffs'

claim under the first agreement, given that the consideration for the transfer of the plaintiffs' shares in D7 to D3–D6 was both the transfer of shares in Fabrika Technologies Sdn Bhd and the payment of RM180,000, can a trust arise when only part payment of the sum was made and the balance is barred by limitation? In other words, is the consideration due from D3–D6 namely the sum of RM180,000 together with the transfer of shares in Fabrika Technologies Sdn Bhd severable?

(d) If a trust does arise in favour of the plaintiffs, does laches defeat the plaintiffs' claim?

Issue (i): Is the Plaintiff's claim for: (a) the shop house under the Second Agreement; and (b) the shares in Fabrika Technologies Sdn. Bhd. under the First Agreement time barred under section 6 of the Limitation Act 1953, or does it fall within the purview of section 22(1)(b) of the Limitation Act 1953 whereby no period of limitation applies?

[19] Learned counsel for the third to sixth defendants as well as the seventh and eighth defendants contend that the plaintiffs' cause of action in relation to the first and second agreements is premised on a breach of contract in that the defendants failed to fulfil or perform their parts of the bargain under those agreements. This is not in dispute. Accordingly they argue that as the cause of action is premised on a breach of contract or specific performance, the limitation period is prescribed clearly by s 6 of the Limitation Act 1953 as amounting to six years from the date of the accrual of the cause of action.

[20] In relation to the shop house, learned counsel for D7 and D8 points to the relevant clause in the second agreement, namely cl 7.1 stipulating that the property, ie the shop house was to be transferred within one month of the execution of the second agreement ie on or by 26 December 1997 (as the agreement is dated 26 November 1997). Accordingly it is contended that limitation set in on 27 December 2004, and the plaintiffs' claim is therefore barred absolutely by statute. Learned counsel emphasised strongly that the second agreement, like the first agreement was an agreement for the sale of shares. It was not, he maintained an agreement for the sale and purchase of land. In the instant case the plaintiffs were described in the second agreement as the vendor while D7 was described as the purchaser and D8 as FTASB. As stated earlier, D8 held the shop house on trust for D7. In other words, D8 was the legal or registered proprietor while D7 was the beneficial owner.

[21] In relation to the shares in Fabrika Technologies Sdn Bhd under the first agreement, learned counsel for D3–D6 also relies on s 6 of the Limitation Act 1953, to maintain that the plaintiffs' claim is barred. The section provides, inter alia, as follows:

6 Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say — (a) Actions founded on a contract or on tort; (b) Actions to enforce a recognisance;

(a) Actions founded on a contract or on tort;

(b) Actions to enforce a recognisance;

(c) …

(d) …

(2) …

(6) Subject to sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

[22] As a consequence counsel for the defendants maintain that the plaintiffs had at all material times, under the first and second agreements, which were share sale agreements, causes of action founded on breach of contract seeking specific performance. Accordingly the cause of action arose when a breach of each of those agreements occurred, which was the case in early December 1997 with regards to the first agreement and after the expiry of one month from the date of execution of the second agreement, ie on or by 26 December 1997. Six years from those dates occurred in December 2003, long before the current suit was initiated.

[23] It is evident from the foregoing that indeed the plaintiffs do found their case on breach of contract against the defendants in relation to the first and second agreements respectively. However a perusal of the statement of claim will disclose that having pleaded the material terms and net effect of the agreements, the plaintiffs go on to state that:

(a) the defendants breached the terms of the first and second agreements; and

(b) but that as the plaintiffs complied fully with both the first and second agreements, the six defendants are holding the shares of Fabrika Technologies Sdn Bhd on trust for the plaintiffs, as the beneficial owners of the same, since 1997 or 1998; and D7 and/or D8 are holding the shop house on trust for the plaintiffs, being the beneficial owners, since 1997 or early 1998 (see particularly paras 12 and 23 of the statement of claim).

[24] It would appear from a perusal of the body of the statement of claim and the relief sought that the plaintiffs have pleaded a cause of action that is founded both in contract as well as premised on the recovery of trust property

in the possession of a trustee, namely the defendants. In the relief sought, the plaintiffs seek a declaration that D1–D6 hold their respective shares in Fabrika Technologies Sdn Bhd on trust for the plaintiffs who they maintain are the beneficial owners of the said shares. Further they also seek a declaration that D7 and/or D8 hold the shop house on trust for the plaintiffs who claim to be the beneficial owners of the same.

[25] It is evident from the foregoing that it would not be possible to simply categorise the plaintiffs' claim as being one founded solely on breach of contract. The existence of a trust, and the fact that property comprising the subject matter of the first and second agreements is held by the defendants on trust for the plaintiffs has been specifically pleaded. The net effect, it would appear is that the plaintiffs claim appears to be founded both on breach of contract as well as the recovery of 'trust property' stated to be held by the defendants as 'trustees'.

[26] This conclusion is further borne out by the fact that in the body of the statement of claim and in the prayers, the plaintiffs, after having pleaded the existence of a trust in their favour in relation to the shares of Fabrika Technologies Sdn Bhd and the shop house, go on to seek in the alternative, damages. This latter prayer would appear to relate back to a cause of action founded in contract. However the specific prayers seeking a declaration of a trust and seeking recovery of such 'trust property' cannot be categorised as following up on a claim premised on breach of contract. Even if it can be said that it amounts to seeking an action for specific performance, s 6(6) (reproduced above) which relates to claims for specific performance of a contract, is specifically subject to s 22 of the Limitation Act 1953.

[27] Section 22 of the Limitation Act 1953 provides as follows:

> 22(1) No period of limitation prescribed by this act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use …' Section 22(2) is not relevant in the present context

[28] It follows from the above that causes of action for specific performance of a contract which involve or encompass the recovery of trust property by a beneficiary from a trustee is not caught by the limitation period of six years prescribed under s 6(6), but is subject to s 22 which requires that either sub-s (a) or (b) be proved whereupon no limitation period applies.

[29] The plaintiffs here in like manner seek to rely on s 22(1)(b) of the Limitation Act which prescribes that no limitation period is stipulated in the Act for the recovery of trust property from a trustee. Extrapolated to the present context, the plaintiffs argue that D1–6 and D7 and/or D8 are the trustees who hold the Fabrika Technology Sdn Bhd shares and the shop house on trust for them as beneficiaries. Accordingly they contend that the limitation period prescribed in s 6 does not apply to preclude their claim as they fall neatly within s 22(1)(b). The textbook *Lewin on Trusts* (18th Ed), in the opening passages of chapter 44 on Limitation of Actions states, in relation to the policy of the English Limitation Act 1980 which has sections equipollent to the Limitation Act 1953 in Malaysia, and is therefore arguably applicable here, as follows:

> … Very broadly, the policy of the Act is to accord special treatment to cases in two categories: first, no protection is to be given for a fraudulent breach of trust and, secondly, a trustee is never to be allowed to keep trust property for himself. The act therefore provides that no period of limitation prescribed by it should apply to claims in either category, which are left subject to no limitation period at all. In other cases, there is a six year time limit for bringing an action.

[30] As s 22(1)(b) is pari materia with s 21(1)(b) of the English Act, the foregoing reasoning as to the policy behind the statute appears entirely cogent. In the instant case therefore the plaintiffs maintain that they have founded their claim essentially on the existence of a trust whereby the defendants have in their possession trust property belonging to the plaintiffs as beneficial owners. There is, therefore, no limitation period prescribed they maintain, for the recovery of their own property held in trust for their benefit.

[31] The defendants, as has been said, maintain that the plaintiffs' cause of action is limited to breach of contract and/or specific performance both of which are time barred. Having evaluated carefully the pleadings in the instant case as well as the legal arguments put forward by counsel for both parties, it appears to this court that the plaintiffs' claim does not preclude a claim for the recovery of trust property held by the defendants as trustees. This arises, as I have pointed out earlier, from the express manner in which the plaintiffs have pleaded that the defendants hold the subject property on trust for them as the beneficial owners, which arises from their having performed in full all their obligations under the first and second agreements. While it is true that they have pleaded a breach of the subject contracts, this is entirely necessary to set out the factual matrix giving rise to what they claim to be a 'trust' situation. There is no plea of a termination of the agreements following upon the breach. Again the prayer for damages is in the alternative. The relief sought is effectively for a declaration of a trust. Therefore the plaintiffs' claim appears on a consideration of the entirety of the factors to be founded on a claim for recovery of trust property rather than a simple breach of contract claim seeking to recover damages or specific performance.

[32] Even if I am incorrect in so finding, it would appear that the plaintiffs' claim comprises a claim that is founded both on breach of contract as well as the recovery of trust property arising from the existence of a trust in their favour. It is entirely possible for the plaintiff to found its claim on more than one cause of action. This is frequently done, particularly in relation to contract and tort. Often a plaintiff will plead a cause of action in contract followed upon by an alternative cause of action founded in tort. In like manner in the present case, the plaintiff appears to have founded its claim on both a breach of contract and trust. As such while the claim founded on a breach of contract is time barred, the cause of action premised on the recovery of trust property remains intact as it is not barred by limitation by virtue of s 22(1)(b). This is also evident from s 6(6) which expressly provides that the section is subject to s 22 of the Act. It therefore next falls to be considered whether s 22(1)(b) is indeed applicable to the facts of this case.

Issue (ii): Does a trust arise in the context of the factual matrix relating to the partial performance of the Second Agreements warranting the application of section 22(1)(b) of the Limitation Act 1953? Does a trust arise in favour of the Plaintiffs in relation to the shop house?

[33] With regards to the shop house, the plaintiffs maintain that under the second agreement, they did all that they had to do to perform the entirety of their obligations, namely the transfer of their 34% shareholding in D8–D7. The second agreement, as it will be recalled, required D7, in consideration of the transfer of the shares to transfer the shop house to the plaintiffs. At all material times in 1997, prior to the second agreement D8 held the shop house on trust for D7. It is also not in dispute that D7 and D8 through their solicitors executed the relevant transfer forms and issue document of title and forwarded this to the plaintiffs' solicitors. It follows from this that at all material times D7 and D8 were ready, willing and able to fulfil their obligations under the second agreement. It was only when further documentation was required in relation to the trust relationship between D7 and D8 and the requisite resolutions were required as well as a new format for the transfer documents that D7 and D8 then refused to co-operate.

[34] In this context the plaintiffs rely on *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 to maintain the existence of a trust in favour of the plaintiffs in or by end December 1997. In that case, the Federal Court traced the concept of the applicability of a bare trust concept under the torrens system in Malaysia especially in view of s 6 of the Civil Law Act 1956 (Revised - 1972). Edgar Joseph SCJ (as he then was) traced the usage of this concept with express reservations as enunciated by Lord Roskill in the Privy council decision of *Chin Choy & Ors v Collector of Stamp Duties* [1981] 2 MLJ 47. Having considered several cases His Lordship said:

> … The question when the vendor of land becomes a bare trustee for the purchaser in Malaysia has not been uniformly answered by the old Federal Court, in the days when our apex court was the judicial committee of the privy council and this is reflected in a number of its decisions, to some of which we should now like to refer.

[35] In *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149 (FC) Suffian FJ (as he then was) said (at p 151):

> In my judgment the company (the vendor) becomes in equity a trustee for the plaintiff (the purchaser) and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid.

[36] In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (FC) Ong Hock Sim FJ said (at p 47):

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (the purchasers) are bare trustees for the appellants of the said land …

[37] This view was not dissented from by the Privy Council when Their Lordships dealt with the matter on appeal (see [1976] 2 MLJ 44). But, in the earlier case of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (FC) Gill FJ took a somewhat different view when he said (at p 229):

> … the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. (Emphasis added.)

[38] Judith Sihombing in her book *National Land Code: A Commentary* (2nd Ed), 1992) at p 801 says that the proprietor has done all that is necessary when he has given the donee a transfer in registrable form and the issue document of title.

[39] In *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 (FC), it was held (at p 119) that a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

[40] *In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly*

executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land … (Emphasis added.)

[41] On the facts of the present case, it is not in dispute that the plaintiffs, as the party that would become the owner of the land under the terms of the second agreement, paid D7 and/or D8 in full and timeously by tendering and facilitating the transfer of their 34% shareholding in D8–D7. D7 and D8 did tender through their solicitors, as I have outlined above, a duly executed transfer form and issue document of title in favour of the plaintiffs. As such the plaintiffs maintain that D7 has effectively divested itself of its beneficial interest in the shophouse held through D8, to the plaintiffs.

[42] Learned counsel for D7 and D8 argues strenuously that this is not the case. In the first place he argues that this concept of a bare trust in a vendor purchaser situation for the sale of land is wholly inapplicable in the present circumstances. Learned counsel points to the fact that the second agreement comprises a share sale agreement and not a sale and purchase agreement for land as is the case in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* (above) and the series of cases reviewed there.

[43] Further, learned counsel points to the fact that under the second agreement, the plaintiffs are stated to be the vendors. They are not the purchaser. It is D7 who is described as the purchaser. As such it is contended that the principle of the existence of a bare trust cannot be applied to the present factual matrix as this would give rise to confusion because it can never be the case that the 'vendor', ie the plaintiffs, could have a trust in their favour, as it is always the 'purchaser' who enjoys the benefit of such a bare trust. The reverse position, counsel maintained could never arise.

[44] Secondly learned counsel for D7 and D8 also maintains that these defendants have not done all that they need to do to enable a trust to come into existence. He points to the fact that several documents impeding the registration of the shop house in the plaintiffs' name were not made available by these defendants. Accordingly he maintains that no trust can be construed to have arisen here.

[45] I have considered carefully the arguments put forward by learned counsel on this issue. It appears to me that the principles enunciated in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* (above) and *Temenggong Securities & Anor v Registrar of Titles, Johore & Ors* (above) are applicable to the factual matrix here. While it is true that on the one hand the second agreement comprises in part a sale of shares, it cannot be ignored that the consideration for the sale of the shares, is land. In other words, in as much as the plaintiffs were

the vendors of the shares of D8, and D7 the purchaser of the same, D7 was equally in the position of the vendor of the shop house while the plaintiffs were purchasers of the same. The fact that the plaintiffs were labelled the 'vendor' in the second agreement does not and cannot vitiate the fact that they were the effective purchasers of the shop house under the second agreement. The consideration for the shop house was the sale of their 34% shareholding in D8. The mere labelling of the plaintiff as 'vendor' does not therefore detract from the fact that in so far as the plaintiffs and D7 were concerned there was a reciprocal promise to sell and buy shares in D8 in return for transfer of the shop house to the plaintiffs. Just as a contract for the sale and purchase of land comprises two reciprocal promises, one to pay a certain consideration for the purchase of the land, and by the other party to divest itself of ownership and possession of the property in return for the consideration, in the instant case, the plaintiffs undertook to divest themselves of the ownership of their shares in D8, in return for which D7 promised to divest itself of its beneficial ownership of the shop house. As the plaintiff has performed its obligations in full by effecting the full consideration undertaken in the second agreement, and as D7 too has, through its solicitors, made available to the plaintiffs' solicitors the requisite memorandum of transfer as well as transfer document of title, it follows that D7 full intended to and took the requisite steps to divest itself of ownership of the shop house to the plaintiffs.

[46] In these circumstances the applicability of the bare trustee concept to the sale of property is clear. It does not seem tenable to this court that the entire principle enunciated in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* (above) and the long line of renowned authorities are inapplicable here simply because this case involves the sale of shares and land as opposed to being a straightforward sale and purchase of land. The principles are, therefore in the view of this court, wholly applicable.

[47] Having then applied the principles set out above to the present factual context, which I have outlined in detail in the earlier part of this judgment, it appears that both parties, after the execution of the second agreement took all necessary steps to effect a transfer of the subject shop house to the plaintiffs. The fact that D7 made available the memorandum of transfer and issue document of title and took possession of the consideration set out in the second agreement, amounts to sufficient basis for this court to conclude that a trust arose and subsists as of December 1997 or early 1998.

[48] It was also argued by the defendants in this case that the court ought not to lend a hand in equity where specific performance would not be granted. However as I have pointed out above, s 6(6) which deals with specific performance, provides expressly that the limitation period of six years

prescribed there is subject to s 22 of the Limitation Act. This in turn takes us back to the issue of whether or not a trust exists in favour of the plaintiffs.

[49] Finally, on this issue there is the fact that from 1999 onwards, D7 has made a note in its audited accounts to the effect that D7 had entered into a sale and purchase agreement and it was the opinion of their legal advisors that the property was held in trust for the purchaser. The purchaser was not identified. The sole witness for D7 and D8, Yong Yew Shui, DW1 ('DW1') who was a director at the material time, and remains one to date, when asked who 'this purchaser' referred to, professed that he had no idea. Given his presence in D7 throughout these years, his professed lack of knowledge was questionable.

[50] Learned counsel for D7 and D8 sought to suggest, in the absence of any evidence or pleadings, that there was in fact a third party purchaser with whom D7 had entered into a subsequent sale and purchase transaction which therefore formed further reason to refuse the plaintiffs' any relief.

[51] Having heard DW1 and considered the submissions of learned counsel for D7 and D8 as well as the plaintiffs, it appears to this court that:

(a) there was a failure on the part of D7 and/or D8 to provide full disclosure in relation to the notation pertaining to their own auditors' statement that the property was held in trust for a 'purchaser';

(b) only D7 and/or D8 would or could know the identity of this purchaser. This is a matter peculiarly within their knowledge and therefore only they could produce evidence of the same (see s 106 of the Evidence Act 1950). The fact that the plaintiffs sought to rely on these notations to support their case does not impose a burden on the plaintiff to produce evidence as to whom D7 and its agents were referring to. That can only be disclosed by D7 and/or its agents;

(c) there is no evidence before this court, nor was any plea taken in the defence pleadings to justify this court inferring that there is another third party purchaser who owns the beneficial interest in the shop house. Therefore the contention that there is a possibility of third party ownership is dismissed on the grounds that there is no basis for such a contention, save for mere conjecture; and

(d) on a balance of probabilities, it is far more probable, that the notation confirms the position that in view of the second agreement the beneficial ownership in D8 passed from D7 to the purchaser, namely the plaintiffs. And such is my finding.

[52] In all the circumstances of this case, I am therefore satisfied that a trust subsists in favour of the plaintiffs, having arisen when the parties exchanged all

requisite documents to effect a transfer of the shop house to the plaintiffs in December 1997, after the plaintiffs had effected a transfer of their 34% shareholding in D8–D7. Accordingly, as of December 1997, D8 held the shop house as a trustee for and on behalf of the plaintiffs, beneficial ownership having moved from D7 to the plaintiffs. As D8 is the trustee holding trust property, the beneficiary, namely the plaintiffs enjoy the right under s 22(1)(b) to recover such trust property from the possession of the trustee. No limitation period is applicable in these circumstances.

[53] If I am incorrect in concluding that a bare trust arose in favour of the plaintiffs as of December 1975, it would appear that under the terms of the second agreement, an alternative construction that is available in relation to the second agreement is that it effectively amounted to an assignment of D7's beneficial interest in the shop house in favour of the plaintiffs. The interest that was assigned, being the beneficial interest was therefore equitable in nature, rendering the assignment under the agreement an equitable assignment. In *Halsbury's Laws of England*, Vol 6, at para 8, '… equitable rights to property, such as beneficial interests under trusts …' are categorised as choses in action. At para 27 of the same volume the mode of assignment of choses in action in equity is described thus:

> … Apart from assignments in the narrower sense of express transfers, with which this title is primarily concerned, it should be observed that another person may become entitled in equity to a chose or thing in action by other means than express transfer. First the owner of the chose in action may declare that he holds it in trust for another. Secondly the owner may enter into a contract for valuable consideration to assign to another. Thirdly, a beneficiary under a trust may direct the trustees henceforward to hold the trust property on trust for another instead of him …

[54] In the instant case, the second instance whereby D7 entered into a contract for valuable consideration to assign his beneficial and thereby equitable interest in the shop house to the plaintiffs. The fact that the words assignment do not appear in the second agreement is immaterial. No particular form of words is required so long as the words clearly show an intention that the assignee, ie the plaintiffs were to have the benefit of the chose or thing in action, namely the beneficial interest in the shop house. And that indeed is the case here. The equitable assignment was complete when the second agreement was executed as an equitable assignment takes effect once agreed to by the assignee. As such once the transfer of the beneficial interest was effected, the plaintiffs stand in the position of D7, the transferor or assignor. As such therefore D8 holds the legal title to the shop house on express trust for the plaintiffs as alluded to in the recital to the second agreement. On this reasoning too, the conclusion to be reached is that the plaintiffs' claim is not barred by limitation.

Issue (iii):-Does a bare trust arise in relation to the transfer of Fabrika Technologies Sdn. Bhd. shares under the First Agreement? Is the consideration due from D3 – D6 namely the sum of RM180,000-00 together with the transfer of shares in Fabrika Technologies Sdn. Bhd. severable?

[55] Turning to the issue of the Fabrika Technologies Sdn Bhd shares, which the plaintiffs' make claim for under the terms of the first agreement, the same argument is put forth. In essence the plaintiffs' maintain that as the consideration moving from them to the defendants under the first agreement was been fully satisfied, namely the transfer of their entire shareholding in D7 to D1–D6, and as all relevant documentation required to effect the transfer of the shares to the plaintiffs was also forwarded to the defendants' solicitors in December 1997, beneficial ownership of the shares passed to the plaintiffs as of that date, as a consequence of which D1–D6 hold the shares of Fabrika Technologies Sdn Bhd in trust for the plaintiffs as of December 1997.

[56] Learned counsel for D3–D6 however maintains that the trust principle cannot be applied here. He points to the fact that the relationship between the plaintiffs and D3–D6 is contractual in nature. In exchange for the receipt of the plaintiffs' shares in D7, D1–D6 had to transfer their shareholding in Fabrika Technologies Sdn Bhd and pay RM180,000 to the plaintiffs. The consideration moving from D1–D6 to the plaintiffs is therefore collective, in the sense that it encompasses the transfer of shares as well as the payment of money. Such consideration it is maintained cannot be severed. As the RM180,000 was not paid in full, but only partially, learned counsel maintains that not everything that needed to be done by D3–D6 so as to create a the existence of a trust in favour of the plaintiffs actually arises. The inference of a trust in the current factual matrix, premised on *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* (above) is therefore inaccurate and somewhat simplistic, in his submission.

[57] It appears to this court that on the issue of consideration, it is the consideration moving from the plaintiffs' to D3–D6 that is relevant for the purposes of ascertaining whether or not a trust can be said to have arisen. In the instant case it is not in dispute that the plaintiffs' fulfilled or performed fully the obligations required of them under the first agreement namely the transfer of their shareholding in D7 to D3–D6. Therefore the consideration due from them was fully satisfied. This is analogous to a purchaser paying the full purchase price for the property in issue, albeit land or shares. The fact that D3–D6 did not pay in full the sum of RM180,000 does not and cannot detract from the fact that the plaintiffs' performed their obligations and the full consideration due from them passed to D3–D6.

[58] Significantly the duly executed share transfer forms for the subject Fabrika Technologies Sdn Bhd shares in favour of the plaintiffs were also issued by D3–D6 through their solicitors to the plaintiffs. This signifies a clear intention to divest themselves of ownership of the Fabrika Technologies Sdn Bhd shares.

[59] Does the fact that the full sum of RM180,000 was not paid preclude the arising of a trust in so far as the Fabrika Technologies Sdn Bhd shares are concerned? On the facts of this case, it appears to this court that that is not the case. This is because the Fabrika Technologies Sdn Bhd shares and the sum of RM180,000 are indeed severable in the sense that they are tangibly separate items. The fact that D3–D6 did not pay the quantum in full leaves the parties with a debt due and owing in the sum of RM86,400 by D3–D6 to the plaintiffs. As it is a debt for the recovery of monies, s 6 of the Limitation Act 1953 applies. The cause of action accrued when they failed to make payment under the date stipulated in the first agreement, or arguably upon any extended time accorded to them by the plaintiffs. Whichever the case, limitation has set in, in respect of this debt. On the facts of this case, no trust arises in respect of the monies because the full sum was never deposited with either parties' solicitors for instance, which might have allowed the inference of a trust. Here the balance sum was simply never paid, giving rise to a debt. Accordingly s 22 has no application.

[60] But what of the shares? The failure to transfer the Fabrika Technologies Sdn Bhd shares cannot be said to create a debt. It amounts to a breach of an obligation under the second agreement. In other words, a breach of contract. The plaintiffs by initiating this action are in effect seeking specific performance of that part of the contract relating to the transfer of the shares. Both breach of contract and a claim for specific performance fall within s 6 of the Limitation Act 1953. But a claim for specific performance as specified earlier is subject to s 22. Therefore it falls to be considered whether with regards to the Fabrika Technologies Sdn Bhd shares, a trust subsists, in the sense that a trustee is holding onto the subject shares for a beneficiary. If that is the case, then s 22(1)(b) stipulates that no limitation period prescribed by the Act is applicable.

[61] On the facts of this case, as D3–D6 were at all times ready and willing to transfer these shares to the plaintiffs, and given that the plaintiffs had 'paid' or wholly fulfilled their consideration under the first agreement, it is possible to:

(a) treat the debt separately from the shares; and

(b) infer or recognise the creation and existence of a trust in favour of the plaintiffs since December 1997.

[62] In *Pennington v Waine* [2002] 4 All ER 215 the donor was the beneficial owner of shares in a company of which she was a director. In September 1988 she advised a partner in the company's auditors, one P that she wished to transfer immediately 400 of her shares to her nephew, H. A share transfer form was duly prepared by P. It was placed on the company's file and it was not delivered to either H or the company. Nonetheless the donor indicated to H separately that she wanted to give him some of her shares. She also wanted him to become a director and under the articles of association of the company a director had to hold at least one share. Subsequently in October, P wrote to H on the donor's instructions enclosing a prescribed form of consent to become a director of the company. P also advised that the donor had arranged for the transfer to H of 400 shares in the company. That he advised required no action on H's part. H signed the consent form and the donor countersigned it. In November the donor executed a will whereby she made specific gifts of the balance of her shareholding but made no specific mention of the 400 shares. She died later that month. In the English High Court in subsequent proceedings instituted to determine whether the 400 shares formed part of the donor's residuary estate or were held on trust for H absolutely, the judge conclude that the donor had transferred the whole beneficial interest in those shares to H, thereby rendering herself and her executors bare trustees of the legal interest. It was contended on appeal that the gift was incomplete in the absence of the delivery of the share transfer form to either H or the company. The English Court of Appeal was required to determine whether such delivery was a prerequisite to an equitable assignment of shares by way of gift.

[63] It held that for the purposes of an equitable assignment of shares by way of gift, delivery of the share transfer form, though required, could be dispensed with in some circumstances. In the foregoing case, it was clear that the donor had intended to make a gift. H had been informed of it and it would be unconscionable for the executors to refuse to hand over the share transfer to H after her death. Therefore it was held that delivery of the share transfer before the donor's death was unnecessary so far as the perfection of the gift was concerned. In so holding, the English Court of Appeal reasoned, inter alia, as follows:

> … The legal title to a share may today be conveyed by the execution and registration of an instrument of transfer … However the equitable interest in a share may pass under a contract of sale even if the contract is not completed by registration, (see *Hawks v McArthur*). In addition, a share may also be the subject of a valid equitable assignment (see for example *Re Rose, Rose v IRC*).
>
> This appeal raises the question of what is necessary for the purposes of a valid equitable assignment of shares by way of gift. If the transaction had been for value, a contract to assign the share would have been sufficient: neither the execution nor the delivery of an instrument of transfer would have been required. However, where

A

> the transaction was purely voluntary, the principle that equity will not assist a volunteer must be applied and respected. This principle is to be found in *Milroy v Lord* (1862) 4 De GF & J 254…

B

[64] In the instant case the first agreement was a transaction for value. As such, the agreement comprised a contract to assign the subject shares and constituted a valid equitable assignment. Non-delivery of share certificates or non-registration of the shares does not invalidate the assignment. Given the existence of this equitable assignment of the equitable interest in the shares in favour of the plaintiff, at all material times the assignors, namely D3–D6 held those shares as bare trustess in favour of the plaintiffs.

C

[65] For the reasons cited above, it appears to this court that in so far as the shares are concerned, the plaintiffs' have proved on a balance of probabilities the existence of a trust in their favour since December 1997 warranting the applicability of s 22(1)(b) which defeats the defence contention that this claim is time-barred. The plaintiffs are therefore entitled to recovery of the Fabrika Technologies Sdn Bhd shares.

D

Issue (iv): If a trust does arises or subsists in favour of the plaintiffs, does laches defeat the plaintiffs' claim?

E

[66] The defendants as a whole contend that even if a trust arises in favour of the plaintiffs in relation to both the shop house and the Fabrika Technologies Sdn Bhd shares, the plaintiffs' claim is defeated by laches. They point to the fact that the plaintiffs have failed to explain the inordinate delay in failing to enforce their claim. Reference was made to *In re Len Chee Omnibus Co Ltd Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] 2 MLJ 202 where Raja Azlan Shah J (as His Royal Highness then was):

F

G

> … There is another point which is against the applicant. The court, having concurrent equitable jurisdiction, is not bound to follow what a court of law would do in such a case in adjudicating under s 162 of the Companies Act but will take cognisance of well-known equitable principles. In the words of Lord Camden LC in *Smith v Clay* a court of equity 'has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting the court is passive and does nothing.

H

> The applicant said that she became aware that her shares had been registered in her mother's name subsequent to her mother's death. That was in 1963. Letters of administration of her estate were granted to the last three respondents in July 1966. The present summons were taken out in December 1968. That was not done within a reasonable time after she became aware of the facts entitling her to relief. I am of the opinion that she is guilty of laches …'

I

[67] Applying the foregoing to the current facts, the defendants submit that the plaintiffs have been far from diligent in exercising their rights, and in fact have 'slept' on the same. Enforcement of the agreements ought to have been sought soon after default became clear in 1998. Even after they reactivated matters in 2006 by writing to seek a transfer of the shop house and the subject shares, they took a further four years to initiate these proceedings in 2010. Accordingly the defendants maintain that this is a clear case of laches and that relief to the plaintiffs ought to be refused.

[68] Learned counsel for the plaintiffs prevailed upon this court to give consideration to the subject of laches as admirably explained in 'The Principles of Equitable Remedies' by ICF Spry (2nd Ed):

> … It is established by the course of authorities that proceedings for specific performance will not fail merely because the plaintiff has been guilty of unreasonable delay. In order that relief be refused it is necessary that it should further appear that, as a consequence of that delay, it would be unjust that the plaintiff should obtain an order of specific performance. Admittedly there have been cases in which the lapse of time has been treated as itself a bar But for the greater party they are early cases which were decided at a time when the doctrine of laches had not been fully developed; …

[69] A reference to the foot note at this juncture discloses:

> … Perhaps the best known of these cases is *Milward v Earl Thanet* (1801) 5 Ves 720n Where it was stated that relief would be refused a plaintiff who had not shown himself 'ready, desirous, prompt, and eager'. See also *Smith v Clay* (1767) 3 Bro CC 639 …

[70] The case of *Smith v Clay* (1767) 3 Bro CC 639n was relied upon in *Lee Chee Omnibus* (above). Spry goes on to state:

> … and the few later cases which appear to follow the early decisions should be treated as either containing observations made per incuriam, or else turning upon different questions, such as the application of a limitation period by analogy, or else as depending in truth upon an inference in all the circumstances that the defendant had been prejudiced by the material delay or that there had been acquiescence.
>
> By the end of the nineteenth century it had become clear that a defendant must establish, in order to make out laches, that the delay of which he complains has caused him to be prejudiced or that for some other reason it would be unjust that specific performance be granted. Unreasonable delay alone is not enough. So in 1874 Lord Selborne (in the case of *Lindsay Petroleum Co v Hurd* (1874) LR PC 221 that '… the doctrine of laches applies where, through the material delay, it would be 'practically unjust to give a remedy', and he added, 'Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or

injustice in taking the one course or the other so far as relates to the remedy', and in commenting upon this passage Lord Blackburn subsequently stated, 'I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry it must always be a question of more or less, depending on the degree of diligence which might reasonable be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it'.

[71] While considerably more is said on this subject in the learned treatise, suffice to say that since the 19th century laches has been determined by applying the test put forward in the *Lindsay Petroleum Co v Hurd* (1874) LR PC 221 (above) case by Lord Selborne as enunciated above. Applied to this case while there is indeed considerable delay amounting to about 13 years, the crucial factor is to determine whether such delay has resulted in any acts which detrimentally affect particularly the defendant. This in turn will determine where the balance of justice lies. On the facts of this case, and based on the evidence before this court, particularly the audited annual reports of D7 where a clear notation is made that the subject property is held on trust, it appears that no steps have been taken by the defendant to deal with the property. There was no evidence of any disposition to a third party. In fact such evidence as there is discloses that the property to date is still held by D8 as the legal registered owner. All requisite taxes have been paid and it would appear that the shop house has been utilised for by D7 and/or D8 throughout the years since the execution of the second agreement. To that extent it is the sums of monies paid out by D7 in respect of the property that disclose any such 'detriment' or pecuniary loss suffered by D7 and/or D8.

[72] Given the foregoing this does not appear to be a case where laches would apply so as to defeat the plaintiffs' claim. While it is indeed true that no tenable explanation was forthcoming from the plaintiffs' who were unable to explain the 13 year delay, the net result of this evidence is that there was simply great delay by the plaintiffs' in seeking to recover their property. However nothing was done during that period of 13 years by D7 and/or D8 which resulted in a disposition of the subject property. As stated above the costs incurred in paying statutory taxes and annual outgoings are in any event claimed by D7 and/or D8 in the event that the court concludes there is a trust in existence in favour of the plaintiffs which defeats the limitation bar defence adopted by them. This indeed is the case.

[73] In other words the plaintiffs may succeed in so far as they accept a restricted measure of relief. No prejudice is accorded to the defendants in that they are entitled to be indemnified for any expenditure undertaken in respect of the trust property, namely the shop house. In this context the plaintiffs have sought to recover damages or mesne profits for non-delivery of the vacant

possession of the shophouse from December 1997. It would appear prima facie, that as the defendants were in possession of property held in trust by D8 on behalf of the plaintiffs since that date, they are prima facie entitled to some rental from the time when the trust property came into their hands. The defendants are not entitled to convert trust property to their own use. As the finding of this court is that a trust arose with effect from December 1997, it follows that the further occupation of those premises by the defendants amounted to a conversion of the property for their own use. The plaintiffs are entitled to be compensated for that use (see *Howlett v Howlett* [1949] Ch 767). However D7 and/or D8 are entitled to set-off or claim indemnity (if the quantum awarded is less than the statutory outgoings) for all monies expended by them in respect of statutory outgoings.

[74] This issue does not arise in respect of the Fabrika Technologies Sdn Bhd shares. In any event no evidence was produced during the course of the trial to prove that these shares had been disposed of or dealt with in the period between the first agreement and this action.

[75] For these reasons I find that the plaintiffs have proved their claim on a balance of probabilities and the defence of laches does not defeat their claim.

RELIEF

[76] Turning to the relief sought by the plaintiffs, and consonant with the judgment above, the plaintiffs are granted judgment in terms of the following prayers in their statement of claim:

(a) D1–D6 hold their respective shares in Fabrika Technologies Sdn Bhd on trust for the plaintiffs, the beneficial owners of the aforesaid shares, free from encumbrances (prayer 1.1);

(b) D1–D6 are to transfer forthwith their respective shares in Fabrika Technologies Sdn Bhd free from encumbrances to the plaintiffs and forthwith deliver to the plaintiffs all records and documents of the company at their cost (prayer 1.2);

(c) D7 and/or D8 hold shop house No 48 on trust for the plaintiffs the beneficial owners of the same, free from encumbrances (prayer 3.1);

(d) D7 and/or D8 forthwith transfer the title of shop house No 48 to the plaintiffs, free from encumbrances, and for that purpose, to forthwith execute and deliver to the plaintiffs all documents necessary to register the title of shop house No 48 in the plaintiffs' names, free from encumbrances; (prayer 3.2);

(e) if D7 and/or D8 fail to execute and deliver the documents as stated above to the plaintiffs within 30 days of the date of this order, a senior assistant

registrar or an officer of the court shall be authorised to execute a transfer of shop house No 48 for and on behalf of D8, the eighth defendant as registered owner in favour of the plaintiffs and the aforesaid transfer together with the old title of shop house No 48. Upon the execution of such transfer the same shall be accepted by the relevant land office to register the transfer of the title of shop house No 48 to the plaintiffs free from encumbrances and the relevant land office shall cancel the new title and issue to the plaintiffs a replacement title of shop house No 48 in the plaintiffs' names (prayer 3.3);

(f) the defendants are to deliver vacant possession of the shophouse to the plaintiffs within 60 days of the date of this order (prayer 4.1);

(g) an assessment be duly made by the senior assistant registrar of the mesne profits for use of the shop house from December 1997 to the date of this order. In arriving at this assessment the senior assistant registrar is to offset or take into account the statutory outgoings expended by the D7 and/or D8 over the same period as set out, inter alia, in the counterclaim of D7 and D8. Upon computing the foregoing sums, if it is found that there is a balance owing in favour of the plaintiffs, then D7 and D8 are jointly and severally liable to pay the plaintiffs such balance sum (prayer 4.2 as amended);

(h) D1–D6 and D8 are jointly and severally to indemnify the plaintiffs for any real property gains tax payable by the plaintiffs under the RGPT Act 1976 for the transfer of shop house No 48 to the plaintiffs inclusive of any fine or penalty; and

(i) the costs of this action which I assess to be RM45,000 are to be borne by the defendants jointly and severally.

Order accordingly.

Reported by Kanesh Sundrum